No. 93-2055

In the Supreme Court of the United States

OCTOBER TERM, 1994

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA, ET AL., PETITIONERS

v.

MARYBETH PETERS, REGISTER OF COPYRIGHTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly deferred to the Copyright Office's reasonable interpretation of an ambiguous provision of the Copyright Act of 1976, notwithstanding a prior decision of the court of appeals, rendered without the benefit of the agency's final interpretation, construing the Act differently.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Argument	6
Conclusion	14
Appendix	1a

TABLE OF AUTHORITIES

Cases:

BPS Guard Services, Inc. v. *NLRB*, 942 F.2d 519 (8th Cir. 1991)	11
Cablevision Systems Development Co. v. *Motion Picture Ass'n of America, Inc.*, 836 F.2d 599 (D.C. Cir.), cert. denied, 487 U.S. 1235 (1988)	7
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	4, 6, 7
Golden State Transit Corp. v. *City of Los Angeles*, 493 U.S. 103 (1989)	8, 9
Lechmere, Inc. v. *NLRB*, 112 S. Ct. 841 (1992)	4, 5, 6
Maislin Indus., U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116 (1990)	6
McDonnell Aircraft Co. v. *NLRB*, 827 F.2d 324 (8th Cir. 1987)	11, 12
National Broadcasting Co. v. *Satellite Broadcast Networks, Inc.*, 940 F.2d 1467 (11th Cir. 1991)	2, 3, 5, 7, 8
Saxon v. *Georgia Ass'n of Independent Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968)	9
Schisler v. *Sullivan*, 3 F.3d 563 (2d Cir. 1993)	11
United States v. *Jackson*, 968 F.2d 158 (2d Cir.), cert. denied. 113 S. Ct. 664 (1992)	10

Cases—Continued: Page

United States v. *Palacio*, 4 F.3d 150 (2d Cir. 1993), cert. denied, 114 S. Ct. 1194 (1994) 10, 11
Variable Annuity Life Ins. Co. v. *Clarke*, 998 F.2d 1295 (5th Cir. 1993), cert. granted *sub nom. NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 114 S. Ct. 2161 (1994) 9, 10

Statutes and regulation:

Copyright Act of 1976 (17 U.S.C.) 2
17 U.S.C. 102 ..... 1a
17 U.S.C. 111 ..... 2, 3, 4, 5, 7, 12, 1a
17 U.S.C. 111(c)(1) 2, 1a
17 U.S.C. 111(f) 2, 4, 5, 7, 8, 12, 1a-2a
17 U.S.C. 119 13
17 U.S.C. 119 note 13
17 U.S.C. 702 ..... 7, 2a
National Bank Act, 12 U.S.C. 21 *et seq.* 9
National Labor Relations Act, 29 U.S.C. 151 *et seq.* 5
§ 9(b)(3), 29 U.S.C. 159(b)(3) 11
Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, Tit. II, 102 Stat. 3949:
§ 202(2), 102 Stat. 3949-3958 13
§ 207, 102 Stat. 3960 13
21 U.S.C. 841(b) 10
37 C.F.R. 201.17(k) 3

Miscellaneous:

139 Cong. Rec. H876 (daily ed. Feb. 24, 1993) 13
140 Cong. Rec. (1994):
p. S5935 (daily ed. May 18, 1994) 13
p. D764 (daily ed. June 29, 1994) 13
56 Fed. Reg. 31,580 (1991) 3
57 Fed. Reg. (1992):
p. 3284 3
p. 3290 ..... 4, 12, 13
58 Fed. Reg. (1993):
p. 40,363 13
p. 45,263 13
H.R. 1103, 103d Cong., 1st Sess. (1993) 13
S. 1485, 103d Cong., 1st Sess. (1993) 13

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 17 F.3d 344. The opinion of the district court (Pet. App. 10a-16a) is reported at 26 U.S.P.Q.2d (BNA) 1313.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1994. The petition for a writ of certiorari was filed on June 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Copyright Act of 1976 are set forth in the appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

1. Under the Copyright Act of 1976, Title 17, United States Code, a cable system is entitled to retransmit broadcast signals to customers under a compulsory license. 17 U.S.C. 111(c)(1). The Act defines a cable system for this purpose as "a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service." 17 U.S.C. 111(f).

The Act does not specifically address the question whether a satellite carrier qualifies as a "cable system" under Section 111. A satellite carrier retransmits programming from broadcast signals via satellite so that the programming may be viewed in homes that have a satellite dish and that have paid the satellite carrier the requisite fee for an unscrambling device. Pet. App. 2a, 10a-11a, 18a. In *National Broadcasting Co.* v. *Satellite Broadcast Networks, Inc. (SBN)*, 940 F.2d 1467 (1991) (*reproduced at* Pet. App. 17a-25a), the Eleventh Circuit ruled that a satellite carrier is a "cable system" under Section 111. The court of appeals rejected the district court's view that a cable facility, to qualify as a "facility located in any State," 17 U.S.C. 111(f), "must be located entirely within a single state." Pet. App. 20a. The court explained that if Congress had intended the single-state

requirement, it could have drafted the statute more clearly and concisely. The court also indicated that to exclude satellite carriers would deprive persons in sparsely populated regions of high quality television reception. *Id.* at 21a-24a.

The court of appeals noted in *SBN* that the Copyright Office had issued "a policy decision that satellite carriers * * * are not 'cable systems' under § 111." Pet. App. 20a n.4, citing Cable Compulsory License; Definition of Cable Systems, 56 Fed. Reg. 31,580 (1991). While acknowledging that the policy decision "fits within the Agency's rulemaking authority," the court of appeals was not convinced that the rule was meant to apply retroactively or that the Copyright Office had authority to issue retroactive rules. Pet. App. 20a n.4. Moreover, while the court indicated that it found the views of the Copyright Office on the statutory language and history "unpersuasive," the court "express[ed] no opinion on the new rule's validity as applied prospectively." *Id.* at 21a n.4.

2. Subsequently, the Copyright Office promulgated a final regulation providing that satellite carriers are not cable systems within the meaning of 17 U.S.C. 111. Cable Compulsory License; Definition of Cable System, 57 Fed. Reg. 3284 (1992) (rule codified at 37 C.F.R. 201.17(k)).[1] In its promulgation statement, the Copyright Office explained that it rejected the Eleventh Circuit's reasoning in *SBN* because, among other rea-

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[1] 37 C.F.R. 201.17(k) states, in pertinent part: "Satellite carriers * * * are not eligible for the cable compulsory license based upon an interpretation of the whole of section 111 of title 17 of the United States Code. At its election, any such entity who paid copyright royalties into the Copyright Office in an attempt to comply with 17 U.S.C. 111 may obtain a refund of the royalties."

sons, "the facilities of a satellite carrier, specifically the facilities which make the secondary transmission, are not located in any state, let alone the same state." 57 Fed. Reg. 3290 (1992). Thus, the Copyright Office concluded (*ibid.*) that satellite carriers do not satisfy a "critical requirement" of the definition of "cable system," *i.e.*, that the facilities be "located in any State." 17 U.S.C. 111(f).

3. Petitioners are satellite carriers and an industry trade association. They commenced an action in the United States District Court for the Northern District of Georgia challenging the validity of the Copyright Office's regulation. Pet. App. 10a-12a. The district court granted summary judgment in favor of petitioners. *Id.* at 16a. The court rejected petitioners' contention that, under *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992), the Copyright Office's regulation was invalid because it conflicted with the prior interpretation of Section 111 rendered by the Eleventh Circuit in *SBN*. Pet. App. 14a-15a. The court concluded, however, that *it* was bound by *SBN*'s holding that "a satellite carrier * * * is a cable system within the meaning of section 111." *Id.* at 16a. The court explained that it was not free to "reconsider a question already resolved * * * by its own appellate court." *Ibid.*

4. The court of appeals reversed. Pet. App. 1a-9a. The court noted that the Copyright Office is empowered "to promulgate rules concerning the meaning and application of § 111." *Id.* at 5a-6a. Accordingly, the court applied the principle that the Copyright Office's rules are entitled to judicial deference "unless 'they are arbitrary, capricious, or manifestly contrary' to the provisions of the Copyright Act." *Id.* at 6a, quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). The court added

that the principle of deference to permissible agency interpretations remains applicable even if the agency's interpretation contradicts a precedent of the court of appeals—the situation that existed in *Chevron* itself. Pet. App. 6a & n.7.

The court of appeals rejected petitioners' claim that it was bound by the Eleventh Circuit's *SBN* ruling under *Lechmere, Inc.* v. *NLRB*, *supra*. In *Lechmere*, this Court invalidated an interpretation of the National Labor Relations Act rendered by the National Labor Relations Board, because that interpretation contradicted a prior holding of the Supreme Court articulating the statute's "clear meaning" on the relevant issue. Pet. App. 7a, citing *Lechmere*, 112 S. Ct. at 847-848. "Unlike the statutory scheme in *Lechmere*," the court of appeals explained, Section 111(f) "is far from explicit as to the inclusion of satellite carriers." Pet. App. 7a. The decision in *SBN* had not expounded the statute's "clear meaning," but had drawn on "inferences * * * from the statutory scheme and upon our policy determination that satellite carriers should be included for the benefit of their rural customers." *Id.* at 7a-8a. The court also noted that *SBN* had explicitly left open the prospective validity of the Copyright Office's interpretation of Section 111. Pet. App. 8a, citing *SBN*, Pet. App. 21a n.4.

In light of those factors, the court of appeals held that it was not precluded from judging the Copyright Office's rule against *Chevron* standards rather than against *SBN*'s holding. Pet. App. 8a. "A contrary result," the court explained, "illogically would wed this circuit to the *SBN* decision, while all other circuits and the Supreme Court would be bound under *Chevron* to defer to the Copyright Office's rule." *Ibid.*

Turning to the underlying merits of the dispute, the court of appeals determined that the Copyright Office's

interpretation of the statute was a permissible one and therefore valid under *Chevron*. Pet. App. 8a-9a. The court observed that not only was the interpretation consistent with "Congress's 'clear meaning,'" but "virtually nothing in the section's legislative history suggests that Congress even contemplated the entrance of satellite technology into the cable industry." *Id.* at 9a.

ARGUMENT

1. Petitioners contend (Pet. 9-13) that the court of appeals erred by applying principles of deference in reviewing the Copyright Office's rule, rather than giving stare decisis effect to the court's prior holding in *SBN*. According to petitioners (Pet. 12), the court of appeals' analysis conflicts with *Lechmere, Inc.* v. *NLRB*, in which this Court stated that "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." 112 S. Ct. at 847-848, quoting *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). There is no merit to petitioners' contention.

In *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, this Court made clear that in reviewing an agency's interpretation of a federal statute entrusted to its administration, the validity of the interpretation turns on two inquiries. The first inquiry is whether Congress itself has expressed an intention on the relevant issue. If Congress has manifested its intent, both the courts and the agency are bound by that statutory meaning.[2] The second inquiry arises if

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[2] "First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of

Congress has failed to express an intent on the specific issue or if the statute is ambiguous. In that setting, a court does not substitute its own interpretations for those of the agency authorized to administer the statute, but is required to give deference to the agency's interpretations "unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 844.

The court of appeals correctly applied *Chevron* by giving deference to the agency's interpretation here. The court found that Congress had not expressed an intention on the precise issue of whether a satellite carrier is a "cable system" under Section 111(f) of the Copyright Act.[3] Accordingly, it gave deference to the permissible construction of the statute by the Copyright Office, which has authority to promulgate rules interpreting the Act. See 17 U.S.C. 702; *Cablevision Systems Development Co.* v. *Motion Picture Ass'n of America, Inc.*, 836 F.2d 599, 608-609 (D.C. Cir.), cert. denied, 487 U.S. 1235 (1988).

Contrary to petitioners' claim, *Lechmere* did not require the court to apply stare decisis and invoke its prior interpretation of Section 111 in *SBN* to find the Copyright Office rule invalid. First, *SBN* itself explicitly stated that the court was leaving open the validity of the Copyright Office's rule. Pet. App. 20a n.4. Because the *SBN* court did not purport to determine the rule's validity, its holding did not have any stare decisis

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Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843.

[3] The statute applies to "a facility, located in any State, Territory, Trust Territory, or Possession." 17 U.S.C. 111(f). The text of the statute does not have an unambiguous meaning as applied to a satellite facility orbiting 22,000 miles above any State.

effect on that issue. Thus, *SBN* did not preclude the court of appeals from later reviewing the Copyright Office's rule under *Chevron* when the rule's validity was squarely presented. *SBN* itself noted that if it had been reviewing the Copyright Office's rule as applied retroactively, the interpretation "might be entitled to deferential review under *Chevron*." Pet. App. 20a n.4.

Second, *SBN* did not articulate the "clear meaning" of Section 111(f) under the first step of *Chevron*. In contrast to this Court's conclusion in *Lechmere* that a prior decision of the Court had resolved the statute's clear meaning, the *SBN* decision relied "upon inferences drawn from the statutory scheme and upon [the court's] policy determination that satellite carriers should be included for the benefit of their rural customers." Pet. App. 7a-8a. The *SBN* court thus resolved an issue of interpretation on which Congress had not expressed a clear intention. Nothing in *Lechmere* suggests that a court should give stare decisis effect to its own elucidation of an ambiguous provision once the agency vested by Congress with responsibility for administering the statute has expressed a contrary view.

Relying on *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 112 (1989), petitioners argue (Pet. 12 n.8) that *SBN* deserved stare decisis effect even if the court were imposing its own construction on an ambiguous provision. In *Golden State*, the Court stated that "[a] rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute." 493 U.S. at 112. That case, however, did not address any question of judicial review of an agency interpretation. Rather, the federal government had "no authority" to address the

statutory construction issue involved in *Golden State Transit*. *Id.* at 108.

If petitioners' view of stare decisis were accepted, it would lead to absurd results. As the court of appeals noted, Pet. App. 8a, petitioners' view would compel one regional court of appeals to adhere to its prior decision and find the rule invalid, while every other court of appeals—and this Court—would be bound to give the rule *Chevron* deference. It would make little sense for a court of appeals to decline to review the rule under *Chevron*, with the effect that this Court would more often have to intervene to resolve conflicts and review the rule under the proper standard of deference. Moreover, petitioners' approach would encourage parties to seek a judicial construction of a statute before an agency has a chance to interpret it through rulemaking. Pet. App. 8a. Giving precedence to the view of the court rather than the agency in such a setting would conflict with Congress's judgment to vest administrative responsibility in expert agencies and with the *Chevron* framework that this Court established to implement that judgment.

2. Petitioners err in contending (Pet. 13-14) that the decision in this case conflicts with decisions of other courts of appeals. In *Variable Annuity Life Ins. Co.* v. *Clarke*, 998 F.2d 1295, 1299-1300 (5th Cir. 1993), cert. granted *sub nom. NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 114 S. Ct. 2161 (1994) (No. 93-1612), the court of appeals struck down an agency rule in reliance on *Saxon* v. *Georgia Ass'n of Independent Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968), believing that that case had found certain sales of annuities to be prohibited by the "plain language" of the National Bank Act. 998 F.2d at 1299. The Fifth Circuit explained that judicial deference to an agency's

interpretation "is not appropriate under *Chevron* if the intent of Congress is clear." *Ibid.* That statement does not conflict with the court of appeals' decision to give deference to the Copyright Office's interpretation where the intent of Congress was not clear.[4]

Similarly distinguishable is *United States* v. *Palacio*, 4 F.3d 150 (2d Cir. 1993), cert. denied, 114 S. Ct. 1194 (1994). There, despite contrary views expressed by the Sentencing Commission, the court of appeals followed its prior decision in *United States* v. *Jackson*, 968 F.2d 158 (2d Cir.), cert. denied, 113 S. Ct. 664 (1992), which had interpreted the meaning of cocaine base under 21 U.S.C. 841(b). 4 F.3d at 154-155. *Palacio* does not conflict with the decision below for two reasons. First, the prior decision in *Jackson* purported to apply Congress's intent on the precise issue before the court. See 968 F.2d at 163 ("Expert testimony in this case established that there is a clear definition of 'cocaine base' undisputed in the scientific community. It is that meaning that Congress intended section 841(b) to have."). *SBN*, in contrast, constituted an interpretation of the statute on an issue that Congress had not considered or addressed. Second, unlike regulatory agencies that adopt implementing rules for statutes they administer—such as the Copyright Office in this case—the Sentencing Commission's function is to promulgate sentencing guide-

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[4] In our view, the Fifth Circuit erred in holding that the plain language of the National Bank Act bars the disputed annuity sales. Our petition in *Variable Annuity Life Ins. Co.*, however, raises no question about the stare decisis effect of the *Saxon* decision. Thus, contrary to petitioners' suggestion (Pet. 13 n.9), there is no reason to hold the petition in this case pending the decision in *Variable Annuity Life Ins. Co.*

lines, not to construe or administer the provisions of federal criminal statutes. *Palacio*, 4 F.3d at 155.

Any suggestion that the Second Circuit would follow a different rule than the court applied in this case is laid to rest by *Schisler* v. *Sullivan*, 3 F.3d 563 (2d Cir. 1993). In *Schisler*, the court held that it was not bound by its earlier interpretation of an ambiguous federal statute when reviewing the agency's subsequent interpretation. The court explained (*id.* at 568):

> New regulations at variance with prior judicial precedents are upheld unless "they exceeded the Secretary's authority [or] are arbitrary and capricious." [*Heckler* v.] *Campbell*, 461 U.S. [458] at 466, 466-68 [(1983)]; [*Bowen* v.] *Yuckert*, 482 U.S. [137] at 144-54 [(1987)] (upholding Secretary's "severity" regulation as valid under the Act; rejected court's prior rule); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841-45 (1984) (upholding EPA regulation's construction of a statutory term despite conflicts between it and court's precedents); *Grocery Mfrs. of America, Inc. v. Gerace*, 755 F.2d 993, 1001 (2d Cir.), *aff'd*, 474 U.S. 801, *cert. denied*, 474 U.S. 820 (1985).

Finally, *BPS Guard Services, Inc.* v. *NLRB*, 942 F.2d 519 (8th Cir. 1991), held that *McDonnell Aircraft Co.* v. *NLRB*, 827 F.2d 324 (8th Cir. 1987) (*McDonnell II*), required that court to reject an interpretation of the labor laws by the National Labor Relations Board. The issues in *McDonnell II* and *BPS Guard Services* were identical: whether the National Labor Relations Board had reasonably determined that fire fighters were not "guards" within the meaning of Section 9(b)(3) of the National Labor Relations Act, 29 U.S.C. 159(b)(3). 942 F.2d at 523-524. The Eighth Circuit ruled (*id.* at 524)

that it would adhere to its prior construction of the statute in *McDonnell II*, 827 F.2d at 330, which had held the agency's interpretation to be invalid under the statute. The court of appeals in this case did not confront that situation. Here, the court's prior construction of the Copyright Act in *SBN* did not purport to review (let alone invalidate) the agency interpretation that was before the court in this case.

3. Finally, there are two additional reasons that undercut petitioners' request for this Court's review.

First, the court of appeals was correct in upholding, under *Chevron*, the Copyright Office's view that satellite carriers are not "cable systems" under Section 111. Petitioners have not requested the Court to review that holding (see Pet. (i)), and it is an independent justification for the judgment below. Quite apart from whether the Eleventh Circuit should have considered itself bound by stare decisis to reject the Copyright Office's rule, this Court would not be bound by any lower court precedent on that issue. And, under a proper application of *Chevron*, the Copyright Office's interpretation is plainly reasonable and entitled to deference.[5]

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[5] The Copyright Office explained that, to be a cable system, a "facility" must be "located in any State," "receive[]" signals of FCC-licensed stations, and "make[] secondary transmissions." 57 Fed. Reg. 3290 (1992), citing 17 U.S.C. 111(f). A satellite carrier's facility is "not located in any state," but rather makes secondary transmissions "from geostationary orbit above the earth." *Ibid.* In addition, for purposes of determining royalties, Section 111(f) instructs that "two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system." 17 U.S.C. 111(f). Because satellite carriers have no "headends", they lack the physical properties that Congress assumed would be present in establishing a royalty scheme for "cable system[s]." 57 Fed. Reg. 3290 (1992). Finally, for a variety of reasons, the compulsory

Second, Congress is currently considering legislation that would address the underlying dispute in this case.[6] In the Satellite Home Viewer Act of 1988, Congress expressly created a compulsory license for satellite rebroadcast facilities. Pub. L. No. 100-667, Tit. II, § 202(2), 102 Stat. 3949-3958, codified at 17 U.S.C. 119. That temporary compulsory license provision will expire on December 31, 1994. Pub. L. No. 100-667, Tit. II, § 207, 102 Stat. 3960, 17 U.S.C. 119 note. The Senate, however, has passed a bill that would extend that sunset date until December 31, 1999, and make satellite carriers eligible for compulsory licensing under certain circumstances. S. 1485, 103d Cong., 1st Sess. (1993); see 140 Cong. Rec. S5935 (daily ed. May 18, 1994). The House is currently considering similar legislation. H.R. 1103, 103d Cong., 1st Sess. (1993); see 139 Cong. Rec. H876 (daily ed. Feb. 24, 1993) (bill introduced and referred to Committee on the Judiciary); 140 Cong. Rec. D764 (daily ed. June 29, 1994) (bill reported by Committee on the Judiciary as amended). Congress's active consideration of the issue counsels against this Court's review of the decision in this case.

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license regime for cable systems was "clearly directed at localized transmission services" (*ibid.*), not at satellite facilities in geostationary orbit 22,000 miles above the earth.

[6] For that reason, the Copyright Office has delayed the original January 1, 1994, effective date of the rule at issue in this case. See 58 Fed. Reg. 40,363 (1993) ("[T]he legislative climate is bright for satisfying the copyright needs of satellite carriers, MDS, MMDS and other providers with respect to retransmission of broadcast programming. In order to foster the opportunity for congressional action, the Copyright Office is extending the effective date of its cable definition regulation, § 201.17(k), to January 1, 1995."); see also 58 Fed. Reg. 45,263 (1993).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1994

APPENDIX

The Copyright Act, Title 17, United States Code, provides, as pertinent here:

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. * * *

§ 111. Limitations on exclusive rights: Secondary transmissions

* * * * *

(c) Secondary Transmissions by Cable Systems.—

(1) * * * [S]econdary transmissions to the public by a cable system of a primary transmission made by a broadcast station * * * shall be subject to compulsory licensing * * *.

* * * * *

(f) Definitions.—As used in this section, the following terms and their variant forms mean the following:

* * * * *

A "cable system" is a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

§ 702. Copyright Office regulations

The Register of Copyrights is authorized to establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title. All regulations established by the Register under this title are subject to the approval of the Librarian of Congress.